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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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PETITION FOR CERTIORARI FILED JUNE 3, 1992
CERTIORARI GRANTED JUNE 29, 1992

QUESTION PRESENTED

WHETHER, IN THE ABSENCE OF ANY MEDICAL PROBLEMS, A STATE PRISON INMATE STATES AN EIGHTH AMENDMENT CLAIM FOR CRUEL AND UNUSUAL PUNISHMENT BY ALLEGING COMPELLED EXPOSURE TO SECONDARY TOBACCO SMOKE POSES AN UNREASONABLE RISK TO HIS HEALTH; AND WHETHER THE COURT OF APPEALS PROPERLY ADDRESSED THIS ISSUE ON REMAND FROM THE UNITED STATES SUPREME COURT.

LIST OF PARTIES

When respondent filed his action, petitioners were all employees of the Nevada Department of Prisons.

Respondent, William McKinney, was and continues to be, a prisoner confined within the Nevada Department of Prisons.

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PETITIONERS' BRIEF ON THE MERITS

---

*The named petitioners have succeeded Pat Anderson, H. L. Whitley, George Sumner and John Nye, respondents-appellees below, in office. The named petitioners are substituted as parties to this action in accordance with Supreme Court Rule 35(3).

OPINIONS AND JUDGMENTS BELOW

There are two relevant opinions of the Ninth Circuit Court of Appeals which apply to this case. The first opinion is McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991), reprinted in Appendix C to the Petition for Certiorari [hereinafter referred to as McKinney I].

The second opinion, issued on remand from the United States Supreme Court, is McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992), reprinted in Appendix A to the Petition for Certiorari [hereinafter referred to as McKinney II].

The Amended Judgment of the United States Supreme Court, granting the first Petition for Writ of Certiorari, vacating McKinney I and remanding the case for reconsideration, was entered on October 15, 1991, and is reprinted in Appendix B attached to the Petition for Certiorari.

The Order Entering Judgment in Favor of Defendants following trial in the United States District Court for the District of Nevada, entered October 27, 1989, is reprinted in Appendix D attached to the Petition for Certiorari.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory provision is involved in this case: Nev. Rev. Stat. § 202.2491, which is reprinted in Appendix F attached to the Petition for Certiorari.

The Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE

William McKinney [hereinafter McKinney] is an inmate within the Nevada Department of Prisons system, serving a life sentence for murder. On January 28, 1987, he filed a civil rights complaint (See Joint Appendix) alleging he had been

subjected to cruel and unusual punishment in violation of the Eighth Amendment from having been involuntarily exposed to secondary (environmental) tobacco smoke [hereinafter "ETS"]. He sought damages and injunctive relief, claiming his health had been damaged.

The issues relevant to this appeal agreed upon by the parties in their proposed joint pretrial order include:

> 1. *Have the defendants been deliberately indifferent to the serious medical needs of McKinney,* and have they therefore violated his right to be free from cruel and unusual punishment?
>
> 2. *Does McKinney have a constitutional right to be housed in a smoke-free environment?*...
>
> 5. Is McKinney entitled to injunctive relief prohibiting the defendants from housing him in any wing of any unit which also houses smokers?

(See Proposed Joint Pre-Trial Order in Joint Appendix).

At the close of plaintiff's case-in-chief, the Magistrate granted defendants'

motion for a directed verdict, finding that as a matter of law, there is no constitutional right to be housed in a smoke-free environment. The Magistrate also specifically found McKinney had failed to show either a serious medical need or deliberate indifference to it. (Appendix D to Petition for Certiorari).

McKinney appealed the Magistrate's decision on numerous grounds, including whether the Magistrate erred in holding McKinney was not entitled to a smoke-free prison environment.

In its first decision in this case [McKinney I], the Ninth Circuit held McKinney could state an Eighth Amendment claim by alleging involuntary exposure to levels of ETS posed an unreasonable risk of harm to his health, and remanded the case to the district court for further proceedings to allow McKinney to present evidence regarding his exposure to ETS

and whether such exposure created an unreasonable risk of harm to his health. [Appendix A to Petition for Certiorari].

After the Ninth Circuit denied the Petition for Rehearing and Rehearing En Banc, defendants filed their first Petition for Writ of Certiorari (No. 91-269). This Court granted the petition, vacated the judgment of the Ninth Circuit, and remanded the case for reconsideration in light of Wilson v. Seiter, 111 S. Ct. 291 (1991) [hereinafter Seiter] [Appendix B to Petition for Certiorari].

On remand, the Ninth Circuit *affirmed* its earlier decision, stating:

> The [Supreme] Court's establishment in Seiter of a subjective component for an Eighth Amendment claim does not vitiate our determination of what satisfies the objective component. Our holding that it is cruel and unusual punishment to house a prisoner in an environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health constitutes the objective component of McKinney's Eighth Amendment claim. Seiter simply adds another element to

> an Eighth Amendment claim that McKinney must prove.
>
> In our opinion we agreed with the magistrate's ruling that directed a verdict on the issue of defendants' deliberate indifference to McKinney's serious existing medical symptoms. As McKinney points out, indifference to current medical problems is distinct from indifference to the problem of involuntary, long term exposure to unreasonable levels of ETS. Accordingly, we remand for further proceedings to determine whether the prison officials showed deliberate indifference to McKinney's long term exposure to ETS.

McKinney II, at 3043.

Defendants filed their second Petition for Writ of Certiorari following the Ninth Circuit's decision on remand, granted June 29, 1992. (See Joint Appendix.)

JURISDICTION

The jurisdiction of this Court to review the judgment of the Ninth Circuit Court of Appeals upon a petition for writ of certiorari arises under 28 U.S.C. § 1254(a).

. . .

SUMMARY OF THE ARGUMENT

An inmate's exposure to environmental tobacco smoke [ETS], in the absence of related health problems, does not violate the Eighth Amendment proscription against cruel and unusual punishment.

In most prisons, smokers constitute between 70 and 90 percent of the inmate population. Housing options are limited, and there is a constant flow of inmate transfers, necessitating reevaluations and changes in cell assignments. The mere fact that a non-smoking inmate may from time to time be housed with a smoking inmate, or otherwise exposed to ETS from inmates and correctional officers, does not deprive an inmate of the minimal civilized measure of life's necessities, nor does it constitute an affront to the dignity of man. Exposure to ETS does not inflict pain under the Eighth Amendment definition.

The Ninth Circuit erred not only in deciding McKinney's claim met the objective test of Seiter, but in remanding the question of whether McKinney could establish the subjective requirement of deliberate indifference. The Ninth Circuit ignored the Magistrate's specific factual findings, based on the record, that McKinney had failed to show *any* deliberate indifference on the part of defendants.

The Ninth Circuit appears to be the only court which has determined exposure to ETS creates an Eighth Amendment cause of action. Other circuit courts and district courts recently addressing this issue have rejected this conclusion, indicating it should be left to the legislative and administrative branches of government. These courts have specifically pointed to the difficulties of managing prison systems within limited

resources, and that inmates with health problems related to exposure to ETS are protected by their right to adequate medical treatment. Courts have concluded this type of possible health risk does not reach the level of an Eighth Amendment claim compared with other more serious, immediate risks, and some courts have pointed out free citizens have no constitutional protection from ETS.

Prison administrators cannot remove all potential risks to which inmates may be exposed, just as society does not eliminate all risks, including exposure to ETS, faced by non-incarcerated persons. It is the function of prison officials, trained and experienced in matters involving the classification and housing of inmates, to identify and weigh the myriad of risks facing each inmate and to determine the appropriate placement of all inmates within the limita-

tions of budget, facilities, population, safety and security, and other factors.

ARGUMENT

A. Under an Analysis of The Eighth Amendment As It Applies to Prison Conditions Claims, Inmate Exposure To Tobacco Smoke Is Not Cruel and Unusual Punishment.

In Trop v. Dulles, 356 U.S. 86, 100 (1958), this Court stated the basic concept underlying the Eighth Amendment was the dignity of man.

In Estelle v. Gamble, 429 U.S. 97, 102-103 (1976), this Court described the history behind the prohibition against cruel and unusual punishments,

> The [Eighth] Amendment embodies "broad and ideaiistic concepts of dignity, civilized standards, humanity, and decency...," Jackson v. Bishop, 404 F.2d 571, 579 (CA8 1968), against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society," [Trop v. Dulles at 101...] or which "involve the unnecessary and wanton infliction of pain," [Gregg v. Georgia at 173..].

. . .

In Ingraham v. Wright, 430 U.S. 651, 669-670 (1977), the Court made clear that the Eighth Amendment prohibition against cruel and unusual punishment was designed to protect those convicted of crimes,

> The prisoner's conviction entitles the State to classify him as a "criminal," and his incarceration deprives him of the freedom "to be with family and friends and to form the other enduring attachments of normal life." Morrissey v. Brewer, 408 U.S. 471, 482 (1972); see Meachum v. Fano, 427 U.S. 215, 224-225 (1976).

In Bell v. Wolfish, 441 U.S. 520, 545-546 (1979), this Court noted that,

> [C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison...[but] simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations.

The Court in Bell quoted with approval from Pell v. Procunier, 417 U.S. 817 (1974):

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. *Prison administrators therefore should be accorded wide-*

> *ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security*. [citations omitted] ... [C]ourts should ordinarily defer to their expert judgment.

Id. at 547-548 (emphasis added).

The Court also quoted Procunier v. Martinez, 416 U.S. 396, 405-406 (1974),

> Prison administrators are responsible for maintaining internal order and discipline.... Suffice it to say that *the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree*. *Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government*.

Id. at 548, n.30 (emphasis added).

In Rhodes v. Chapman, 452 U.S. 337, 345-346 (1981), this Court held that double celling was not cruel and unusual punishment and explained the Court's interpretation of the Eighth Amendment,

> The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be "cruel and unusual."

...Today the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain..." Among "unnecessary and wanton" inflictions of pain are those that are "totally without penological justification"...

The Court has held, however, that "*Eighth Amendment judgments should neither be nor appear to be merely the subjective views" of judges*. Rummel v. Estelle, 445 U.S. 263, 275 (1980) ... "the Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a given punishment.... But such "judgment[s] should be informed by objective factors to the maximum possible extent."

Id. (emphasis added).

In Rhodes, the Court stated there was no evidence double-celling inflicts pain, only a theory this may be so, which may,

> [R]eflect an aspiration toward an ideal environment for long-term confinement. But *the Constitution does not mandate comfortable prisons, and prisons...which house persons convicted of serious crimes, cannot be free of discomfort*. Thus, these considerations properly are weighed by the legislature and prison administration rather than a court.

Id. at 348-349 (emphasis added).

In Seiter, this Court held an inmate challenging conditions of confinement as cruel and unusual punishment must show prison officials acted with deliberate indifference, i.e., a subjective inquiry must be made in addition to establishing the objective part of an Eighth Amendment claim.

> To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety.... It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause....
>
> These cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment....

Id. at 2324, citing Whitley v. Albers, 475 U.S. 312, 319 (1986).

The Court noted that a claimant has always been required to establish a mental state where cruel and unusual punishment is alleged and the appropriate

standard in cases involving conditions of confinement was deliberate indifference.

> "Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle." [quoting from LaFaut v. Smith, 834 F.2d 389, 391-392 (CA4 1987).

Seiter, at 2327.

In Hudson v. McMillian, 112 S. Ct. 995 (1992), this Court applied the Seiter standard holding the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even where the prisoner does not suffer significant injury, but the seriousness of the injury is a relevant factor in determining whether an Eighth Amendment violation has occurred. Regarding the application of Seiter to inmate claims involving conditions of confinement, the Court stated,

. . .

> Wilson [v. Seiter] extended the deliberate indifference standards applied to Eighth Amendment claims involving medical care to claims about conditions of confinement. In taking this step, we suggested that the subjective aspect of an Eighth Amendment claim (with which the Court was concerned) can be distinguished from the objective facet of the same claim. Thus, courts considering a prisoner's claim must ask both if "the officials act[ed] with a sufficiently culpable state of mind" and if the alleged wrongdoing was objectively "harmful enough" to establish a constitutional violation....
>
> The objective component of an Eighth Amendment claim is therefore contextual and responsive to "contemporary standards of decency." Estelle, 429 U.S. at 103... For instance, *extreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society*," Rhodes, supra, 452 U.S. at 347, 101 S. Ct. at 2399, "*only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation*." Wilson, supra, 501 U.S. at ____, 111 S. Ct. at 2324....

Hudson, at 999-1000 (emphasis added).

There are many risks, immediate and long term, which are faced by people in our society. As a practical matter, some

of these risks can be eliminated, some cannot, and others it would appear society as a whole does not wish to eliminate (e.g., motor vehicles, airplanes, swimming pools, and other obvious sources of risk to one's health). Over the years, medical studies have concluded there are substances which may pose a future risk of harm to human beings. These include alcohol, cigarettes, saccharin, asbestos, high cholesterol diets, overexposure to sun, etc. The precise risk of future harm to any particular person depends upon a wide variety of factors, such as age, health, length and degree of exposure, personal habits, and other considerations.

The likelihood and degree of a particular risk affecting a specific individual is too speculative, however, to warrant Eighth Amendment protection. Certainly, no deprivation of the basic

necessities of life occurs by exposure to ETS, a condition of our society tolerated by incarcerated persons, albeit reluctantly by many. Exposure by an inmate to ETS therefore is neither cruel nor unusual by contemporary standards.

In a prison setting, some risks are virtually eliminated, such as traffic-related injuries and drownings. Some risks are perhaps greater and more immediate in prison than they would be outside prison, such as incidents of violence resulting from enemy situations, escape attempts, and racial tensions. The increased risk may be associated with the antisocial behaviors typically found in convicted felons, and the inability of many of them to adjust to the restrictions of prison life. Without question, prison officials daily are confronted with the exceptionally difficult tasks of housing, classifying, rehabilitating,

controlling and protecting persons who are among the most violent, unpredictable, uncooperative, manipulative and dissatisfied members of our society.

Prison officials cannot be subjected to a never-ending barrage of civil rights lawsuits, in which inmates ask the federal courts to second-guess every classification and housing decision which incidentally results in smoking and non-smoking inmates sharing a cell for a period of time.

B. This Court Should Resolve Conflicting Circuit Decisions By Reversing The Decision Of The Ninth Circuit On Remand (McKinney II).

In addition to the Ninth Circuit's McKinney II decision, there are two circuit court cases addressing the question of inmate exposure to ETS decided after Seiter, both of which determined that *no* Eighth Amendment violation occurred.

. . .

The Tenth Circuit, following a rehearing and rehearing en banc in Clemmons v. Bohannon, 956 F.2d 1523 (10th Cir. 1992) [Clemmons II], applied the Seiter test and rejected an inmate's claim that his Eighth Amendment rights were violated by his exposure to ETS. The inmate had alleged no specific health problems, but maintained ETS created an unreasonable risk to his health.

The court in Clemmons II acknowledged its concern "that exposure to ETS is a potential health hazard, [but] we cannot agree that exposure to ETS rises to the level of an Eighth Amendment violation in this case because the record reveals absolutely no evidence that Clemmons' health has been adversely affected by the cigarette smoke produced by his cellmate." Clemmons II, at 1525.

The Tenth Circuit stated:

Neither the Supreme Court nor this court has ever held that a poten-

> *tial, distant harm to a prisoner's health is a serious medical need*.... "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional" even if those conditions are sometimes "restrictive and even harsh." Rhodes, 452 U.S. at 347. Clemmons' complaint regarding ETS is simply of a lesser magnitude than those cases that have found an Eighth Amendment violation due to deliberate indifference to serious medical need.

Id., at 1527-1528 (emphasis added).

The Seventh Circuit, in Steading v. Thompson, 941 F.2d 498, 500 (7th Cir. 1991), considered the claim of an asthmatic inmate that his exposure to ETS was cruel and unusual punishment. Applying Seiter, the Steading court held there was no evidence to show a culpable state of mind on the part of defendants.

> Secondary tobacco smoke is common in offices, restaurants, and other public places throughout the United States and the rest of the world. No one supposes that restaurateurs who allow smoking are subjecting their other patrons to "punishment", or desire to harm them. The guards and administrators who breathe *smoky* air in the prison are not punishing themselves. No one would suppose, either, that the

> gentlemen tobacco farmers who wrote and adopted the eighth amendment could have conceived of smoke as punishment. Evidence since 1791 presents tobacco in a different light, but debate persists about how severe the effects of secondary smoke may be.

The Steading court pointed out that an inmate with serious medical problems which can be attributed to or worsened by exposure to smoke are entitled to appropriate medical treatment, "which may include removal from places where smoke hovers." Id. 500. However, in the absence of evidence that prison officials intended to *punish* the inmate by placing him in a cell with a smoker, the Eighth Amendment claim failed.

The Fifth Circuit has considered the ETS issue although its decision was made prior to Seiter. In Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989), the court refused to consider the appellant's previously litigated Eighth Amendment claim, re-instigated following new

studies regarding the possible effects of ETS. The court cited with approval from Gorman v. Moody, 710 F. Supp. 1256 (N.D. Ind. 1989),

> [I]t is also relevant to our Eighth Amendment analysis that "society cannot yet completely agree on the propriety of nonsmoking areas and a smoke-free environment."

Gorman, at 1262.

In Gorman, the district court said "smoking is a societal issue best resolved by the executive and legislative branches of government." Id. at 1262.

> The operation of our correctional facilities "is peculiarly the province of the legislative and executive branches of our government, not the judicial." [citations omitted]... *Whether to provide smoke-free areas must be left to the discretion of legislatures and prison officials who must operate the prisons to the best of their abilities, and those officials must make those decisions after a consideration of all factors relevant to the particular institution and the care and wellbeing of all inmates*.

Id. at 1262 (emphasis added).

Lower courts have uniformly held that where an inmate has an existing serious

medical condition which may worsen with exposure to ETS, a valid Eighth Amendment claim is stated. See, e.g., Beeson v. Johnson, 668 F. Supp. 498 (E.D.N.C. 1987); West v. Wright, 747 F. Supp. 329, 332 (E.D.Va. 1990); Gorman v. Moody, 710 F. Supp. at 1262; Steading v. Thompson, 941 F.2d at 500.

A few cases have held that where prison officials had made some effort to accommodate an inmate's complaints about ETS, there was no Eighth Amendment violation. West v. Wright, 747 F. Supp. 329 (E.D.Va. 1990); Johnson v. Moore, 944 F.2d 1533 (9th Cir. 1991).

Courts (other than the Ninth Circuit) have expressed concern about the potential health risk of exposure to ETS. However, these other courts, in deciding no Eighth Amendment claim has been stated, have done so based largely on the following factors: (a) society does not

yet agree upon the extent of the risk of exposure to ETS; (b) if an inmate's health requires minimal exposure to ETS, then prison officials must make good faith efforts to accommodate the situation; (c) this issue should be resolved by the legislative and administrative branches of government charged with the responsibility for management of prison systems; (d) exposure to ETS does not reach the threshold of alleged deprivation or pain for which an Eighth Amendment claim can be stated; (e) permitting an inmate to state a claim for exposure to ETS will subject prison officials to a boundless plethora of claims by inmates that they have been exposed to all types of potential health risks; and (f) unincarcerated citizens have no constitutional protection from exposure to ETS.

. . .

. . .

C. The Ninth Circuit Erred In Holding Exposure To Environmental Tobacco Smoke May Violate An Inmate's Eighth Amendment Rights.

1. The Court Erred In Determining The Evolving Standards Of Decency.

The Ninth Circuit on remand, affirmed its earlier McKinney I decision, in which it relied on reports from the Surgeon General and Environmental Protection Agency regarding the association between ETS and lung cancer, and on its observation that a number of prisons and jails were "beginning to take steps to restrict or ban smoking." [Appendix C to Petition for Certiorari] .

The Ninth Circuit also cited numerous state statutes regulating smoking in public buildings, and specifically referred to Nev. Rev. Stat. § 202.249.

The Ninth Circuit, however, did not acknowledge that a number of states, including Nevada, *exempt* prison facilities from smoking regulations. (See

Nev. Rev. Stat. § 202.249, Appendix F to the Petition for Certiorari.) This is the community standard in Nevada on the application of its laws restricting smoking in public buildings. There are *other* states with statutes regulating smoking in public buildings which also exempt correctional facilities.

Some states' restrictions on smoking are limited to areas *open to the public*, thereby excluding inmate housing. As Judge Tacha stated in his dissent in Clemmons v. Bohannon, 918 F.2d 858, 872 (1990) [hereinafter referred to as Clemmons I], "a review of the state legislation cited by the majority as forbidding or restricting smoking reveals that the *vast majority of these laws are limited to public places*, which are statutorily defined so as to exclude prisons."

Consequently, although the trend in society is toward the protection of non-

smokers in certain public places, such protections have *not* necessarily been extended to prisons in deference to the unique problems associated with the management and classification of inmates. This is the standard of decency which should have been recognized by the Ninth Circuit.

The court may look not only to legislative enactments to determine the standards of decency in our society, but also to case law involving free citizens (as opposed to inmates) challenging the tolerance of ETS in enviro ts such as the workplace.

In Kensell v. State of Oklahoma, 716 F.2d 1350 (10th Cir. 1983), the court rejected a state employee's claim he had a right to a smoke-free working environment,

> The intrusions upon the plaintiff's person resulting from working with fellow servants who smoke is a far cry from forcible injections of mind

> altering drugs and assaults committed by police or prison officials to intimidate or punish persons in their custody. This is not a case in which governmental officers are abusing power they possess only because the government is sovereign...*the United States Constitution does not empower the federal judiciary, upon the plaintiff's application, to impose no-smoking rules in the plaintiff's workplace*. *To do so would support the most extreme expectations of the critics who fear the federal judiciary as a superlegislature promulgating social change under the guise of securing constitutional rights*....

Id. at 1351 (emphasis added).

In Gasper v. Louisiana Stadium and Exposition District, 418 F. Supp. 716 (E.D.La. 1976), the court held the failure of the operators of the New Orleans Superdome to prohibit smoking by the public did not violate the constitutional rights of non-smokers who chose to attend events in that facility.

The United States District Court for the District of Columbia in Federal Employees for Non-Smokers' Rights (FENSR)

. . .

v. United States, 446 F. Supp. 181 (1978), cited with approval from Gasper,

> It is well established that the *Constitution does not provide judicial remedies for every social and economic ill*. Lindsey v. Normet, 405 U.S. 56, 82 S. Ct. 862, 31 L.Ed.2d 36 (1972). Accordingly, if this Court were to recognize that the Fifth and Fourteenth Amendments provide the judicial means to prohibit smoking, it would be creating a legal avenue, heretofore unavailable, through which an individual could attempt to regulate the social habits of his neighbor.
>
> *For the constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of, and to engage in that type of adjustment of individual liberties better left to the people acting through legislative processes*....
>
> This Court finds the facts of Gasper indistinguishable and will adopt its approach. *Without in any way denigrating the importance of plaintiffs' environmental concerns, the Court firmly believes that such matters are better left to the legislative or administrative process, where a proper balancing of interests can be made in a forum where such social decisions can more appropriately be made*.

Id. at 185 (emphasis added).

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2. The Subjective "Deliberate Indifference" Requirement Was Not Met By McKinney At Trial, And He Is Not Entitled To A Re-trial.

In the Order Entering Judgment in Favor of Defendants [Appendix D of the Petition], the Magistrate specifically stated:

> Based upon the testimony adduced by McKinney during his presentation of his case, he *has failed to show either a serious medical need or deliberate indifference to it*....

Order, at 4.

> *There was no evidence presented of personal involvement by any of the Defendants, nor in accordance with the test announced in Beeson above, was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff*.

Order, at 6.

Inexplicably, the Ninth Circuit appeared to be under the mistaken assumption that the Magistrate had not permitted McKinney to present evidence of his exposure to ETS and of defendants' alleged deliberate indifference to the

risk to his health. The record clearly shows McKinney was (a) permitted to testify on his own behalf; (b) permitted to examine inmate witnesses he claimed had observed his problems; and (c) permitted to admit all but two of his exhibits [the rejected exhibits were one set of interrogatories and a packet of anti-smoking brochures and flyers.]

McKinney was given every opportunity to present his case, and the Ninth Circuit offers no explanation for its statement that he was not. It was McKinney's job, not the Magistrate's, to offer credible and admissible evidence sufficient to satisfy his burden of proof. The Magistrate's ruling was that he did not accomplish this, and there is nothing in the record to indicate her decision was an abuse of discretion.

From the evidence presented at trial, including plaintiff's and defendants'

exhibits, McKinney attempted to relate any physical problems he was experiencing to a variety of sources, not just secondary tobacco smoke. He attributed nose bleeds to having to be in a bunk downstairs rather than upstairs. [Def.Ex.B.] He complained that his coughing, sore throat, burning eyes, runny nose, dizzy spells and stomach aches were caused by butane heater fumes. [Def.Ex.C and D.] He asked for medical treatment for throat irritation which he stated was caused by the drinking water and cigarette smoke. [Def.Ex.E.] He attributed sore throats, vomiting, scratching and dizziness to drinking water. [Def.Ex.I-17.] McKinney filed a grievance requesting sugar instead of saccharin with his meals on the grounds "there is an abundance of scientific authority that suggest that saccharin may cause cancer in humans..." and complaining the saccharin caused him

to have headaches, muscle pain and vomiting. [Def.Ex.I-19.] A review of the exhibits shows medical staff responded to his complaints. (See Magistrate's Order, Appendix D to Petition for Certiorari.)

The evidence presented at trial showed staff had attempted to accommodate McKinney's requests, but not all possible alternatives were acceptable to him, and he declined several bed moves. [Def.Ex. F.] He stated he could not get along with 80 percent of the blacks at NSP. [Def.Ex.F.] On June 19, 1988, he complained that his roommate was smoking in the cell [Def.Ex. I-25; also Pl.Ex. 1], and a few days later complained again, stating the smoke caused him to be nauseous, his nose to bleed, and irritated his eyes and throat. [Def.Ex. I-26.] However, when McKinney was contacted by the unit counselor about this complaint, the counselor "was informed by you

[McKinney] that you no longer wanted this move and that your roommate's smoking was not a problem at this time." [Def.Ex. I-26.] McKinney complained about his roommate's smoking in August, 1988, but refused the bed move offered him and was advised there were no available single cells as an alternative at that time. [Def.Ex. I-32; also Pl.Ex. 2.] McKinney also wrote to the warden in April, 1987, stating he did not want to move into Unit 4 because he had "too many enemies in Unit 4." [Def.Ex. F.] In August, 1988, McKinney's counselor advised him she had requested a bed move for him to a cell in single housing. [Pl.Ex. 6.]

McKinney, in his various notes to prison officials, not only rejected alternatives offered to him, he continued to attempt to manipulate a single cell for himself. [Pl.Ex. 5; Def.Ex. I-32.]

. . .

Interestingly enough, one exhibit, an Inmate Personal Property Claim Form for Loss or Damage of Personal Property completed by McKinney in July, 1989, lists as lost items belonging to him "2 cartons of cigarettes (Kools and Camels)." [Def.Ex.H.]

It is commonplace for inmates to employ a boundless variety of manipulative techniques in order to procure such things as unit or facility transfers, single cells, sharing a cell with a friend, certain diets, desirable prison jobs, etc. Prison employees whose responsibility it is to decide such matters are faced with the ever-present task of evaluating the validity of each inmate's requests. Making a change for one inmate necessarily impacts prison resources, staff and other inmates. A change in just one cell assignment may create the need to re-evaluate and possibly alter

the cell assignments of other inmates. Typical methods used by inmates to obtain preferred housing include claims of enemy situations. Inmates claim medical problems or religious requirements in order to receive special foods, privileges, or housing arrangements.

A Pennsylvania District Court, in the context of inmate requests for transfers, has stated the problem well,

> Prison officials are presented with an arduous task when they are called upon to discern legitimate from illegitimate requests for a transfer within the prison. In an ideal world, prisoners would request a transfer based on a sincere fear of physical harm upon which prison officials could rely. However, in a more realistic world, prisoners may feign their fear of physical harm simply to manipulate a transfer. The reasons vary for prisoners to use such fear as a ruse to obtain a transfer - to dorm with a friend and/or to obtain better living quarters are examples. Therefore, when a prisoner requests a transfer because he fears for his life, prison officials are required to determine the credibility of his fear.

Mullen v. Unit Manager Weber, 730 F. Supp. 640 (M.D.Pa. 1990).

The record on appeal includes the affidavit of Don L. Helling, which was filed with the United States District Court on June 19, 1987, as Exhibit A to the defendants' opposition to McKinney's Motion for Preliminary Injunction. Helling stated, "[i]nstitutional security is, of course, the most important consideration [in classification decisions.]" He pointed out that,

> In classifying an inmate, the inmate's institutional history and criminal history are both relevant...inmates are first classified to a particular housing category such as general populations, protective custody, administrative segregation and disciplinary segregation...he is then assigned to a particular unit, wing and cell. Among the factors considered in making this decision are possible enemy situations, the age of the inmate, friendships and ethnic balance within particular housing wings. The personal desires of the inmate are also taken into account insofar as possible.

(See Joint Appendix).

Helling stated that if the classification committee could not place McKinney in any wing housing smokers, this would

unduly burden the process, severely limit housing options, and might make it impossible to place McKinney into a segregation unit should that become necessary. Helling also stated,

> Smoking is very important to many inmates, and I believe that if smoking were banned at NSP it would create a potentially dangerous situation due to the anger of those inmates who do smoke, and constitute a threat to the security of the institution.

The Ninth Circuit erred in ignoring the Magistrate's finding of no deliberate indifference, and should not have ordered a remand on this issue.

Without a showing by McKinney of any personal involvement *or* deliberate conduct on the part of petitioners, he *cannot* prevail on his Eighth Amendment claim. McKinney had his day in court, and failed to present credible evidence to support his claim. The Magistrate properly granted defendants' motion for directed verdict at the close of

McKinney's case in chief. It was error for the Ninth Circuit to attempt to give McKinney a "second shot" at presenting his evidence, ignoring the factual findings of the Magistrate.

3. The Objective Component Of The Eighth Amendment Claim Was Not Met By McKinney.

The Wilson court stated,

> The Constitution, we said "does not mandate comfortable prisons," id., at 349, and only those deprivations denying "the minimal civilized measure of life's necessities," id., at 347, are sufficiently grave to form the basis of an Eighth Amendment violation. [quoting from Estelle v. Gamble, 429 U.S. 97 (1976)].

Id. at 2324.

The Eighth Amendment prohibition against cruel and unusual punishment does not embrace the concept of an environment in prison which is free from varying levels of secondary tobacco smoke. Such an environment does not exist in the real world, save for those exceptions carved out by state legislatures applicable to

certain buildings open to and used by the general public. McKinney is not entitled to a prison cell meeting his standards of comfort, and his occasional exposure to ETS does not deprive him of "the minimal civilized measure of life's necessities."

The mere existence of a potential health risk does not constitute cruel and unusual punishment. If it did, inmates would be filing civil rights complaints every time they were exposed to another inmate with a cold. The Ninth Circuit stated at 14 of its Opinion [Appendix C],

> [W]hile not every deviation from ideally safe conditions may amount to a constitutional violation, we ruled [in Hoptowit v. Spellman] that conditions of confinement that seriously threaten the health and safety of the inmates are unconstitutional.

McKinney made no showing at trial that his health or safety had been threatened by exposure to ETS. That was sufficient for the Magistrate to have granted defendants' motion for a directed verdict.

The Ninth Circuit has ignored this Court's remand and has imprudently expanded upon those conditions of confinement which belong under the umbrella of Eighth Amendment protection. The mere possibility that something may cause a future risk of harm to one's health does not entitle an inmate to elimination of all potential health risks. The burden on state prison systems to comply with such a requirement would be insurmountable. Certainly, free citizens have no such entitlement to be free from potential health risks.

As much as one may sympathize with the discomfort some inmates experience when exposed to ETS, if there is no existing serious medical need which requires attention, there is no cruel and unusual punishment under the Eighth Amendment when compared under society's evolving standards of decency.

Clearly, exposure to ETS causes discomfort and annoyance to many people, and not to others. There may be a possible future risk of harm to others, but the urgency of removing the risk of harm from exposure to ETS is remote compared to the need to reduce or eliminate other more serious and immediate risks confronting inmates.

The Tenth Circuit Court has stated,

> The role of this Court is not to spearhead and define society's evolving standard of decency. Rather, this Court must interpret and apply the Constitution of the United States. *When the dissent attempts to create new standards of decency based on reports by the Environmental Protection Agency and the Surgeon General, it ceases to interpret the Constitution. Instead of applying constitutional standards, the dissent's reasoning mandates a public health ideal for all of society.* See Rhodes, 452 U.S. at 351, 101 S. Ct. at 2401.

In assessing claims that conditions of confinement are cruel and unusual, courts must bear in mind that their inquiries "spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility."

> (quoting Bell v. Wolfish, 441 U.S. 520, 539 (1979).

Clemmons II, at 1529 (emphasis added).

Tenth Circuit Court Judge Tacha, in his eloquent dissent in Clemmons I, stated "a constitutional right to a smoke-free cell would have no limits and it would open a Pandora's box of constitutional challenges for prison administrators," and there is,

> *[N]o justification whatsoever for making the rights of non-smoking prisoners paramount over the myriad of health and security concerns that prison officials must confront and balance daily*. At worst, the majority opinion lays the groundwork for a constitutional burden that will be impossible for prison authorities to carry,... At best, the majority imposes an unwarranted and unprecedented constraint on the discretion of prison administrators to balance potential versus immediate health and safety concerns.

Clemmons I, at 873 (emphasis added).

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4. The Eighth Amendment Claim As Determined By The Court Was Not The Issue On Appeal And Should Not Have Been Decided In The Absence Of Briefing By The Parties.

In granting defendants' motion for a directed verdict against McKinney, the Magistrate found that,

> McKinney failed to produce *any evidence* to support his claim that the defendants were deliberately indifferent to his serious medical symptoms...[and] as a matter of law, McKinney had no constitutional right to be free of secondary cigarette smoke.

Opinion, at 3, Appendix C, Petition for Certiorari (emphasis added).

The Ninth Circuit panel stated,

> The magistrate framed the issue in all-or-nothing terms: either McKinney had a constitutional right to a completely smoke-free environment, or he had only a constitutional right to medical attention for proven serious medical needs. By so doing, the magistrate excluded a valid eighth amendment claim lying between those two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment.

Opinion, at 3, Appendix C, Petition for Writ of Certiorari.

The Ninth Circuit erred in two respects. First, the Magistrate did *not* frame the issues to be tried. The parties determined the issues in their proposed joint pre-trial order, which were whether defendants had been deliberately indifferent to McKinney's serious medical needs, and/or whether McKinney had a constitutional right to be housed in a smoke-free environment. Thus, the Magistrate merely ruled on the issues the *parties* had agreed upon for trial.•

Second, the question on appeal was not whether McKinney's constitutional rights had been violated by compelled exposure to secondary tobacco smoke, but rather was whether the Magistrate abused her discretion in granting the defendants' motion for a directed verdict. Under laws existing at that time, the Magistrate's ruling was entirely correct and

was not an abuse of discretion. The Ninth Circuit did not point to any abuse of discretion.

It was inappropriate for the Court of Appeals to consider an issue not tried, nor raised on appeal, nor briefed by the parties. See Matter of Texas Mortgage Services Corporation, 761 F.2d 1068, 1073 (5th Cir. 1985), which stated, "that issues not raised or argued *in the brief* of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals."

Similarly, in F&H Inv. Co. v. Sackman-Gilliland Corp., 728 F.2d 1050 (8th Cir. 1984), the court declined to reach an issue neither briefed, nor discussed at oral argument by either party.

The Ninth Circuit inappropriately chose to impose its own views on the desirability of inmate exposure to ETS without any notice to the parties and, at

the very least, should have asked the parties to submit additional briefing on the point. Petitioners could have advised the court of the accommodations generally made within the system for both smoking and non-smoking inmates, and could have referenced to trial exhibits which showed attempts by prison officials which *were* made to accommodate McKinney. Petitioners could have refuted or questioned the conclusions reached by the authorities upon which the Ninth Circuit chose to rely which were *not* part of the record on appeal.

CONCLUSION

For the reasons discussed above, the petitioners respectfully ask this Court

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to reverse the judgment of the Ninth Circuit Court of Appeals.

DATED: August 24, 1992

Respectfully submitted.

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